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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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11 GREGORY SANDERS,

No. C-07-6007 TEH (PR)

12 Petitioner,

13 v.

ORDER DENYING PETITION FOR WRIT
OF HABEAS CORPUS

14 ROBERT AYERS, Warden

15 Respondent.
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18 Petitioner Gregory Sanders, a state prisoner incarcerated
19 at San Quentin State Prison, seeks a writ of habeas corpus under 28
20 U.S.C. section 2254 challenging the California Board of Parole
21 Hearings' ("BPH") September 21, 2006 decision to deny him parole,
22 which, for the reasons that follow, the Court denies.
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24 I

25 At the time of the offense, Petitioner was separated from
26 his estranged wife, who, along with her boyfriend, were staying with
27 her mother at her mother's mobile home in San Bernardino County.
28 Doc. #5-6 at 2. Petitioner also was staying at the mobile home with

1 his four year old son. Id; Doc. #5-5 at 17.

2 On February 1, 1988, Petitioner and his son left the
3 mobile home. Doc. #5 at 2; Doc. #5-5 at 17, 57; Doc. #5-6 at 2.
4 Prior to their return, Petitioner noticed a "great big huge
5 handprint" on his son's arm. Doc. #5-5 at 18. When Petitioner
6 asked his son what had happened, he explained that his mother's
7 boyfriend "had hurt him." Id; see also id. at 79.

8 Petitioner became angry and when he returned to the mobile
9 home, he went directly to the bedroom shared by his estranged wife
10 and her boyfriend and shot both of them. Doc. #5-5 at 79; Doc. #5-6
11 at 2. When the mother of Petitioner's estranged wife heard the
12 gunshots, she went to the bedroom and witnessed Petitioner shoot the
13 boyfriend a second time and then shoot her daughter. Petitioner
14 fled the scene and was arrested later by the San Bernardino County
15 Sheriff's helicopter crew. The boyfriend died at the scene;
16 Petitioner's estranged wife survived. Doc. #5-6 at 2.

17 On November 9, 1988, Petitioner was sentenced to 16 years
18 to life in state prison following his guilty plea to second degree
19 murder with a special allegation that he was armed with a deadly
20 weapon during the commission of the murder. Doc. #5-2 at 2-4. His
21 minimum eligible parole date was October 1, 1998. Doc. #5-5 at 4.

22 On September 21, 2006, Petitioner appeared before BPH for
23 his sixth parole suitability hearing. Doc. #5-5 at 2. At that
24 hearing, BPH found Petitioner "was not yet suitable for parole and
25 . . . would pose an unreasonable risk of danger to society or a
26 threat to public safety if released from prison." Id. at 76. BPH
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1 Lambert, 370 F.3d 1002, 1009-10 (9th Cir. 2004). Under AEDPA, this
2 Court may entertain a petition for habeas relief on behalf of a
3 California state inmate "only on the ground that he is in custody in
4 violation of the Constitution or laws or treaties of the United
5 States." 28 U.S.C. § 2254(a).

6 The writ may not be granted unless the state court's
7 adjudication of any claim on the merits: "(1) resulted in a
8 decision that was contrary to, or involved an unreasonable
9 application of, clearly established Federal law, as determined by
10 the Supreme Court of the United States; or (2) resulted in a
11 decision that was based on an unreasonable determination of the
12 facts in light of the evidence presented in the State court
13 proceeding." 28 U.S.C. § 2254(d). Under this deferential standard,
14 federal habeas relief will not be granted "simply because [this]
15 court concludes in its independent judgment that the relevant
16 state-court decision applied clearly established federal law
17 erroneously or incorrectly. Rather, that application must also be
18 unreasonable." Williams v. Taylor, 529 U.S. 362, 411 (2000).

19 While circuit law may provide persuasive authority in
20 determining whether the state court made an unreasonable application
21 of Supreme Court precedent, the only definitive source of clearly
22 established federal law under 28 U.S.C. section 2254(d) rests in the
23 holdings (as opposed to the dicta) of the Supreme Court as of the
24 time of the state court decision. Williams, 529 U.S. at 412; Clark
25 v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003).

III

Petitioner seeks federal habeas corpus relief from BPH's September 21, 2006 decision finding him unsuitable for parole and denying him a subsequent hearing for two years on the ground that the decision does not comport with due process.

A

Under California law, prisoners like Petitioner who are serving indeterminate life sentences for noncapital murders, i.e., those murders not punishable by death or life without the possibility of parole, become eligible for parole after serving minimum terms of confinement required by statute. In re Dannenberg, 34 Cal. 4th 1061, 1077-78 (2005). At that point, California's parole scheme provides that BPH "shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration." Cal. Penal Code § 3041(b). Regardless of the length of the time served, "a life prisoner shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." Cal. Code Regs. tit. 15, § 2402(a). In making this determination, BPH must consider various factors, including the prisoner's social history, past criminal history, and base and other commitment offense, including behavior before, during and after the crime. See Id. § 2402(b)-(d).

1 California's parole scheme "gives rise to a cognizable
2 liberty interest in release on parole" that cannot be denied without
3 adequate procedural due process protections." Sass v. California
4 Bd. of Prison Terms, 461 F.3d 1123, 1128 (9th Cir. 2006); McQuillion
5 v. Duncan, 306 F.3d 895, 902 (9th Cir. 2002). It matters not that a
6 parole release date has not been set for the inmate because "[t]he
7 liberty interest is created, not upon the grant of a parole date,
8 but upon the incarceration of the inmate." Biggs v. Terhune, 334,
9 F.3d 910, 915 (9th Cir. 2003).

10 Petitioner's due process rights require that "some
11 evidence" support BPH's decision finding him unsuitable for parole.
12 Sass, 461 F.3d at 1125. This "some evidence" standard is
13 deferential, but ensures that "the record is not so devoid of
14 evidence that the findings of [the board] were without support or
15 otherwise arbitrary." Superintendent v. Hill, 472 U.S. 445, 457
16 (1985). Determining whether this requirement is satisfied "does not
17 require examination of the entire record, independent assessment of
18 the credibility of witnesses, or weighing of the evidence." Id. at
19 455. Rather, "the relevant question is whether there is any
20 evidence in the record that could support the conclusion reached by
21 the disciplinary board." Id. at 455-56.

22 Due process also requires that the evidence underlying
23 BPH's decision have some indicium of reliability. Biggs, 334 F.3d
24 at 915; McQuillion, 306 F.3d at 904. Relevant to this inquiry is
25 whether the prisoner was afforded an opportunity to appear before,
26 and present evidence to, BPH. See Pedro v. Oregon Parole Bd., 825
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1 F.2d 1396, 1399 (9th Cir. 1987). If BPH's determination of parole
2 unsuitability is to satisfy due process, there must be some reliable
3 evidence to support the decision. Rosas v. Nielsen, 428 F.3d 1229,
4 1232 (9th Cir. 2005).

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6 B

7 Petitioner claims that BPH's finding that he was
8 unsuitable for parole violated his due process rights because: (1)
9 BPH's decision was not supported by some evidence, see Doc. #1 at 1-
10 8 (Contention I), 13-20 (Contention III) & 21-23 (Contention IV);
11 (2) BPH considered impermissible evidence in its decision; and (3)
12 BPH's continuous denials of parole violate the terms of Petitioner's
13 plea agreement. Each of Petitioner's claims is analyzed below.

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16 Petitioner claims BPH's finding that he was unsuitable for
17 parole violated his due process rights because the decision was not
18 supported by some evidence. Specifically, in Contention I,
19 Petitioner claims BPH's finding that he was unsuitable for parole
20 violated his due process rights because "there is no . . . evidence
21 to support the board's decision that Petitioner currently poses an
22 unreasonable threat to public safety if released from prison." Doc.
23 #1 at 1, emphasis in original; see id. at 1-8. In Contention III,
24 Petitioner disputes the sufficiency of the evidence finding him
25 unsuitable, rather than suitable, for parole, going through each of
26 the specific factors set forth in California Code of Regulations,

1 Title 15, § 2402(b)-(d). Doc. #1 at 13-20. And in Contention IV,
2 Petitioner claims the decision to deny him parole was not based on
3 sufficient evidence, but rather was the result of a biased decision
4 maker who predetermined his fate. Doc. #1 at 21-23.

5 As an initial matter, the Court notes that the record
6 shows BPH afforded Petitioner and his counsel an opportunity to
7 speak and present Petitioner's case at the hearing, gave them time
8 to review documents relevant to Petitioner's case and provided them
9 with a reasoned decision in denying parole. Doc #5-5 at 8-11, 14 &
10 76-89.

11 The record also shows that BPH relied on several
12 circumstances tending to show unsuitability for parole and that
13 these circumstances formed the basis for its conclusion that
14 Petitioner posed "an unreasonable risk of danger to society or a
15 threat to public safety if released from prison." Doc #5-5 at 76;
16 see Cal. Code Regs. tit. 15, § 2402(a) (stating that a prisoner
17 determined to be an unreasonable risk to society shall be denied
18 parole).

19 First, BPH told Petitioner that he had "one of the more
20 unrealistic set of parole plans," which referred to Petitioner's
21 plan "to retire and go fishing and live off the generosity of [his]
22 children for the rest of [his] life." Doc. #5-5 at 76-77; see also
23 id. at 42-45, 58-60 & 84. During the hearing, when asked if he
24 "perchance considered working" Petitioner responded, "[o]nly as a
25 hobby." Id. at 45.

26 Second, BPH examined the commitment offense and found that
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1 the offense:

2 . . . was carried out in a specially cruel and
3 callous manner. . . . Multiple victims were
4 attacked. These were people that semi-trusted
5 you, an estranged wife, her boyfriend, you'd
6 been invited into the home. The offense was
7 carried out in an execution style murder. You
8 had a loaded gun. You walked into a room with
9 the intent of killing somebody. You almost hit
10 or injured a third person, a lady who cared for
11 you, the mother. The offense was carried out in
12 a manner which demonstrate[s] exceptionally
13 callous disregard for human suffering and your
14 motive for the crime was trivial, very, very
15 trivial.

16 Doc. #5-5 at 77-78; see also id. at 86-87; see Cal Code Regs tit 15,
17 § 2402(c)(1)(D) (listing "exceptionally callous disregard for human
18 suffering" as factor tending to show unsuitability for parole).

19 Third, BPH noted that Petitioner had been in prison for 18
20 years and had "not yet developed a vocation." Doc. #5-5 at 80.
21 Fourth and somewhat related, BPH expressed concern over Petitioner's
22 "lack of specifically designed self-help programs for dealing with
23 [his] issues with women," an apparent reference to Petitioner's
24 domestic violence history. Id. at 81; see also id. at 87 & 52 (BPH
25 noted that Petitioner "seem[s] to find [his] way to very hostile and
26 aggressive and potentially murderous relationships with women[]" and
27 "[found] it more than a coincidence that [Petitioner has been]
28 married to three different women and all three of them . . . made
some attempt at injuring . . . or killing [him]").

29 Fifth, BPH cited the psychological evaluation prepared in
30 anticipation of Petitioner's parole suitability hearing, which noted
31 Petitioner

1 . . . would present a low risk of future
2 violence . . . if he were able to have his
3 psychological needs met. In an environment
4 where he would have checks on his tendency to
5 form intense volatile relationships he would be
6 expected to do so well. His maladaptive
7 personality traits contribute to his repeated
8 selection of partners who are emotionally
9 unstable, untrustworthy or exploitive. Until
10 [Petitioner] understands himself better he is at
11 risk of becoming involved with persons who will
12 evoke maladaptive behaviors and/or emotional
13 instability.

14 Doc. #5-5 at 83, emphasis added.

15 BPH also considered other factors tending to support
16 suitability for parole including: (1) Petitioner's lack of
17 significant history of violent crime; (2) that Petitioner received
18 at least 24 educational units through Patten University; (3) that
19 Petitioner was a member of Vietnam Veterans of America; (4) that he
20 had been working through the Prison Industry Authority, currently as
21 a sergeant's clerk at the infirmary; and (5) that Petitioner had
22 received no Rules Violation Reports under California Department of
23 Corrections and Rehabilitation ("CDCR") Form 115(A), and received
24 only one Custodial Counseling Chrono pursuant to CDCR Form 128-A in
25 March 1991. See Cal. Code Regs. tit. 15, § 3312(a)(2)-(3). Doc.
26 #5-5 at 79-80 & 86.

27 At the conclusion of the hearing, BPH cited specific areas
28 in which Petitioner could improve:

29 . . . And one [area] is a vocation. You need to
30 develop something that will support yourself.
31 You need to be able to do that. You know,
32 you're 54 going on 55 and you're not going to
33 get Social Security till you're 62 . . . Don't
34 put all your eggs in one basket. You need to
35 work on some insight issues. Also, . . . you're
36 a little bit flip. You're affect is off and

1 . . . you're defensive and avoidant in some
2 arenas. . . . We talked about you need to deal
3 with issues of volatile relationships and
4 improve your parole plans, develop a vocation
and do some more self-help, book reports for
example, with regards to your relationships with
women.

5 Doc. #5-5 at 88.

6 The state superior court affirmed the decision of BPH to
7 deny Petitioner parole, finding that it was supported by "more than
8 'some evidence.'" Doc #5-7 at 5. Indeed, in addressing this claim,
9 the superior court stated:

10 The board found that the Petitioner was not yet
11 ready for parole as he would pose an
unreasonable risk to society. The board found
12 that the Petitioner's parole plans were
unrealistic in that he intended to retire and go
13 fishing and live off his children. The board
recommended that he develop some realistic
14 parole plans and demonstrate that he would be
able to support himself. The board further
15 found that the offense was carried out in a
cruel and callous manner and in this the court
16 agrees. The court further agrees with the board
in its classification of the killing as being an
execution style murder.

17 The board viewed the Petitioner's prison conduct
18 and commended him for not receiving any CDC
115's and having received only one CDC 128 in
19 March of 1991. The board was concerned that the
Petitioner had been in prison for 18 years and
20 had not developed any type of vocation. The
board recommended that the Petitioner develop
21 some skills. The board considered the
psychological report . . . dated in March of
22 2006 and commented on the Petitioner's poor
performance on his GAF [Global Assessment
23 Functioning] test.

24 [It] was obvious from a reading from the
proceedings in the board's decision that the
25 Petitioner did not make a good impression with
the board and that the board considered his
26 attitude to be somewhat flippant.

1 This court finds that there was more than "some
2 evidence" to justify the finding of
3 unsuitability of Petitioner for parole and a two
4 year denial on that finding.

5 Doc. #5-7 at 4-5. The state appellate court summarily denied
6 Petitioner's request for habeas corpus relief, Doc. #5-9 at 37, and
7 the state supreme court summarily denied his Petition for Review.
8 Doc. #5-9 at 2.

9 On this record, the court finds that the state courts'
10 rejection of Petitioner's due process claim that BPH's decision was
11 not supported by "some evidence" was not contrary to, nor did it
12 involve an unreasonable application of, clearly established federal
13 law, and it was not based on an unreasonable determination of the
14 facts. See 28 U.S.C. § 2254(d); Williams, 529 U.S. at 409.

15 The record shows that BPH had some reliable evidence to
16 support its finding of unsuitability. BPH observed that Petitioner
17 had unrealistic parole plans, failed to develop a vocation, failed
18 to participate sufficiently in self-help programs addressing his
19 domestic violence issues, and did not receive a psychological
20 evaluation supportive of his parole. Based on these failures,
21 especially when viewed in conjunction with the nature of the
22 commitment offense, this Court cannot say that BPH's finding that
23 Petitioner was unsuitable for parole was "without support or
24 otherwise arbitrary." See Hill, 472 U.S. at 457. On this record,
25 BPH reasonably concluded that Petitioner was not yet suitable for
26 parole. See, e.g., Rosas, 428 F.3d at 1232-33 (upholding denial of
27 parole based on gravity of offense and the petitioner's psychiatric
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1 reports documenting his failure to complete programming while in
2 prison); Biggs, 334 F.3d at 916 (upholding denial of parole based on
3 gravity of offense and the petitioner's conduct prior to
4 imprisonment); Morales v. California Dep't. of Corrections, 16 F.3d
5 1001, 1005 (9th Cir. 1994), rev'd on other grounds, 514 U.S. 499
6 (1995) (upholding denial of parole based on the cruel nature of
7 offense, the petitioner's unstable and criminal history, and his
8 need for further psychiatric treatment). It is not up to this
9 Court, as Petitioner urges in Contention III, see Doc. #1 at 13-20,
10 to "reweigh the evidence." Powell v. Gomez, 33 F.3d 39, 42 (9th
11 Cir. 1994).

12 Petitioner in Contention IV attacks BPH's decision finding
13 him unsuitable for parole on the ground the decision was not based
14 on sufficient evidence, but rather was the result of a biased
15 decision maker who predetermined his fate. Doc. #1 at 21-23. In
16 support of this claim, Petitioner cites a comment made by one of the
17 BPH panel members, claiming she "chose to make the parole
18 consideration hearing personal, . . . when she stated: 'Also, you
19 know, your presentation today kind of got under my skin a little
20 bit. Your [sic] a little bit flip.'" Id. at 21. Petitioner claims
21 this panel member "took it so personal, she even made an
22 unprofessional opinion when stating that Petitioner was a little bit
23 flip." Id. According to Petitioner, the result of his parole
24 suitability hearing "was predetermined as a result of [the panel
25 member's] admittance that she felt effected [sic] by Petitioner and
26 Petitioner's parole plans to possibly stay with and mooch from his
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1 children until he got on his feet." Id. at 23.

2 Due process requires that a parole board charged with
3 determining whether or not a particular prisoner is suitable for
4 parole be "neutral and detached." Morrissey v. Brewer, 408 U.S.
5 471, 488-89; see also O'Brenski v. Maass, 915 F.2d 418, 422 (9th
6 Cir. 1990) (to satisfy due process, a prisoner "is entitled to have
7 his release date considered by a parole board that [is] free from
8 bias or prejudice").

9 Here, although the panel member's observation was an
10 honest, albeit perhaps a less than artful one, the Court disagrees
11 with Petitioner's claim that it demonstrates bias. Assuming for the
12 sake of argument, however, that the comment did demonstrate bias,
13 there is no evidence in the record indicating that this alleged bias
14 affected BPH's decision or served as the basis for finding
15 Petitioner unsuitable for parole. On the contrary, the transcript
16 from Petitioner's September 21, 2006 parole hearing demonstrates
17 that he received an individualized assessment of his potential
18 parole suitability. Doc #5-5 at 76-89. Further, as demonstrated
19 above, there was ample reliable evidence to support BPH's decision
20 to deny petitioner parole.

21 Under these circumstances, the state courts' rejections of
22 Petitioner's claim cannot be said to have been objectively
23 unreasonable. See 28 U.S.C. § 2254(d); Williams, 529 U.S. at 409.

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26 Petitioner next claims that BPH considered impermissible
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1 evidence at his parole suitability hearing in violation of his right
2 to due process. According to Petitioner, it was improper for BPH to
3 find that the commitment offense was "especially cruel," because
4 that is an element of first degree murder, and he "was not convicted
5 of having committed the commitment offense in a[n] 'especially
6 cruel' manner." Doc. #1 at 9. Relying on Cunningham v. California,
7 549 U.S. 270 (2007), Petitioner claims that his minimum term of
8 imprisonment was 16 years, and that "[i]n order for Petitioner's
9 term to be set at life without the possibility of parole, the
10 elements used to determine that finding must be found true by a
11 jury." Id. at 11; see id. at 9-13.

12 In Cunningham, the United States Supreme Court held that
13 California's Determinate Sentencing Law, which authorized a judge,
14 rather than a jury, to find facts that exposed a defendant to an
15 elevated upper term sentence, violated a defendant's Sixth Amendment
16 right to a trial by jury. Cunningham, 549 U.S. at 293. Cunningham
17 is the progeny of an earlier Supreme Court case, Apprendi v. New
18 Jersey, 530 U.S. 466 (2000). In Apprendi, the Supreme Court held
19 that "[o]ther than the fact of a prior conviction, any fact that
20 increases the penalty for a crime beyond the prescribed statutory
21 maximum must be submitted to a jury, and proved beyond a reasonable
22 doubt." Id. at 490. The "statutory maximum" discussed in Apprendi
23 is the maximum sentence a judge could impose based solely on the
24 facts reflected in the jury verdict or admitted by the defendant; in
25 other words, the relevant "statutory maximum" is not the sentence
26 the judge could impose after finding additional facts, but rather
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1 the maximum he could impose without any additional findings.

2 Blakely v. Washington, 542 U.S. 296, 303-04 (2004).

3 Cunningham involved a violation of a defendant's Sixth
4 Amendment right to a trial by jury with respect to sentencing under
5 the Determinate Sentencing Law, and did not address a petitioner's
6 rights at a parole suitability hearing, which is what Petitioner is
7 challenging. Petitioner was not sentenced under California's
8 Determinate Sentencing Law; rather, he was sentenced to an
9 indeterminate life sentence following his guilty plea to second
10 degree murder with a special allegation that he was armed with a
11 deadly weapon during the commission of the murder. Doc. #5-2 at 2-
12 4. Given the inapplicability of Cunningham to Petitioner's
13 situation, the state courts' rejections of Petitioner's claim cannot
14 be said to have been objectively unreasonable. See 28 U.S.C. §
15 2254(d); Williams, 529 U.S. at 409.

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18 Petitioner's final claim is that his continued
19 incarceration violates the terms of his plea agreement in that he is
20 being deprived of enforcement of the October 1, 1998 minimum
21 eligible parole date he bargained for when he entered a guilty plea
22 to the charged offense. Doc. #1 at 23-28. In addressing this
23 claim, the state superior court wrote: "[a] review of the [plea]
24 agreement reveals that there was no specific term agreeing to the
25 consideration of a finding of suitability for parole at any
26 particular time in the future." Doc. #5-7 at 3.

1 "[W]hen a plea rests in any significant degree on a
2 promise or agreement of the prosecutor, so that it can be said to be
3 a part of the inducement or consideration, such promise must be
4 fulfilled." Santobello v. New York, 404 U.S. 257, 262 (1971). A
5 plea agreement containing a specific promise, such as when the
6 defendant will be paroled, is enforceable. See Brown v. Poole, 337
7 F.3d 1155, 1161 (9th Cir. 2003) (that state prosecutor had no right
8 to offer deal defendant accepted in exchange for waiving her
9 constitutional rights may be a problem for state, but not
10 defendant). But it is Petitioner who bears the burden of proving
11 any alleged promise made by the prosecution. See Santobello, 404
12 U.S. at 261-62. Petitioner makes no such showing.

13 Rather, the record shows that although Petitioner's
14 minimum sentence was 16 years, he potentially could serve the
15 maximum of life in prison. Doc. #5-2 at 2-4. Nothing in the record
16 indicates that Petitioner is entitled to release at any time prior
17 to a finding by BPH that he is suitable for parole. Petitioner's
18 observation that "[a]t the time [he] agreed to waive his rights [and
19 plead guilty], the finding of suitability for parole was not as
20 stringent as it is today," Doc. #1 at 28, is of no import. Cf.
21 Evenstad v. United States, 978 F.2d 1154, 1158-5 (9th Cir. 1992)
22 (change in the law regarding parole eligibility does not render an
23 earlier guilty plea involuntary).

24 Under these circumstances, the state courts' rejection of
25 Petitioner's breach of plea agreement claim cannot be said to be
26 objectively unreasonable. See 28 U.S.C. § 2254(d); Williams, 529
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1 U.S. at 409.


3 IV

4 For the reasons set forth above, the Petition for a Writ
5 of Habeas Corpus is DENIED.

6 The Clerk shall terminate any pending motions as moot,
7 enter judgment in favor of Respondent and close the file.

10 IT IS SO ORDERED.

13 DATED 06/09/09



THELTON E. HENDERSON
United States District Judge

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